On this point, counsel for the plaintiffs argued that the fifth defendant had never been discharged by the plaintiffs as no formal discharge had been executed by them to that effect. He, however, agreed that this requirement was not stated in the letter of guarantee. In any case, he submitted that since the fifth defendant had signed the letter of guarantee in her personal capacity, her ceasing to be a director of the first defendant did not terminate her liability. I was of the view that this constituted a triable issue in the circumstances and had the effect of strengthening the fifth defendant's application to set aside the judgment in default of appearance. Assuming I was in error, the irregular service on her alone was sufficient to set aside the judgment in default of appearance with costs.

Concerning the appeal by the fourth and sixth defendants, the plaintiffs had applied for final judgment against the second, fourth and sixth defendants by way of summons-in-chambers filed on 6 November 1987. The fourth and sixth defendants had in fact filed their joint statement of defence on 28 July 1986 and there had been no explanation from the plaintiffs as to the 16-month delay in filing their application except for para 11 in encl 33 where the plaintiffs averred on the time taken for foreclosure proceedings. On the unexplained delay alone, the court had the power to set aside the order for final judgment if it thought it fit.

The fourth and sixth defendants, in addition, stated the same grounds as the fifth defendant as to the fact that they had ceased to be directors and had been discharged from the letter of guarantee. As for the fourth defendant, the court held that as in the case of the fifth defendant, he had raised triable issues on the merits apart from the fact that the delay in the application for the summary judgment had not been explained satisfactorily. I accordingly allowed his appeal with costs. However, the same could not be said for the sixth defendant as his name does not appear in that particular company resolution and despite the fact that the application for summary judgment was filed 16 months after his statement of defence, the court was of the view that he had not raised any triable issues and in the event dismissed his appeal with costs.

Order accordingly.

Solicitors: *Henry Lim & Co*; *Asbir, Hira Singh & Co.*

Reported by *Ng Sheau Jiuan*

National Union of Teachers in Independent Schools, West Malaysia v Han Chiang High School, Penang

HIGH COURT (KUALA LUMPUR) – CIVIL APPEAL NO R8-16-18-88
EUSOFF CHIN J
27 JANUARY 1989

Civil Procedure – Reference of questions to High Court after Industrial Court handed down award – Whether High Court is limited to determine only questions referred to it – Whether Industrial Court is bound to refer any question of law to High Court – Industrial Relations Act 1967, s 33A(1) & (5)

Administrative Law – Dispute over collective agreement between appellant union and respondent school – Industrial Court finding that union had no locus standi before court as no teacher of school belonged to union – Collateral dispute over alleged wrongful dismissal of teachers by respondent school pending adjudication before another division of Industrial Court – Whether Industrial Court erred in law and in fact in coming to conclusion that teachers' services had been lawfully terminated and thus no teacher belonged to union – Whether Industrial Court exceeded jurisdiction

The respondent school and the appellant union were locked in two disputes; one was a dispute over a collective agreement on wages and terms and conditions of employment for the teachers employed by the respondent school, and the other was a dispute over the alleged wrongful dismissal of 35 teachers by the respondent school. The dispute over the collective agreement was referred to the Industrial Court on 12 January 1987 for adjudication and the dispute over alleged wrongful dismissal of 35 teachers was referred to another division of the Industrial Court on 14 August 1987. At the hearing of the first dispute in the Industrial Court on 27 July 1987, the respondent school raised a preliminary issue that the appellant union had no locus standi to represent the teachers, arguing that none of the teachers in the school was a member of the union. This was because out of 53 teachers who were members of the union, 18 had resigned from the union on various dates and 35 had their services terminated by way of non-renewal of their contracts. The Industrial Court made a finding that there was not a teacher employed by the school who was a union member and as such, the union could not represent and act in a dispute on behalf of the school teachers who were not its members or were no longer its members. The court thus decided that the appellant union had no locus standi before the court. The appellant union thereafter applied under s 33A(1) of the Industrial Relations Act 1967 for questions of law to be referred to the High Court.

At the hearing before the High Court, there were some arguments as to the jurisdiction and powers of the High Court when hearing an appeal under s 33A of the Industrial Relations Act, viz whether the High Court is limited to determine only questions referred to it.

Held, allowing the appeal:

(1) On the application of any party to the proceedings in which the award is made, the Industrial Court is not bound to refer any question of law to the High Court under s 33A(1) of the Industrial Relations Act 1967, unless the Industrial Court is satisfied that the question is one which fulfils all the conditions provided in that section. In exercising its power to refer or not to refer a question to the High Court, the Industrial Court will have to do so judiciously. But once a question is referred to the

High Court, the reference will be treated as if it were an appeal to the High Court and each question referred to the High Court will be treated as a ground of appeal. Under s 33A(5), the High Court will hear and determine the reference as if it is hearing an appeal from a lower court.

(2) In holding that the appellant union had no locus standi because it no longer had any members, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated. The Industrial Court had no jurisdiction to determine that dispute because that very dispute had not been referred to it by the Minister but to another division of the Industrial Court to adjudicate.

(3) The finding by the Industrial Court that the appellant union had no members was wholly unsupported by evidence. The court had reached that finding by assuming erroneously that because no union member was present before it when it made the award, the union had no member to represent.

Case referred to

1 *Reading & Bates (M) Sdn Bhd, Miri* v *Sarawak Union of Lands & Offshore Drilling Workers* [1987] 1 ILR 299 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 9(2), (5), 30(3), 33A(l), (5)

B Lobo for the appellant.
Cyrus V Das for the respondent.

Cur Adv Vult

Eusoff Chin J: The appellant in this case being dissatisfied with Award No 49/88 handed down by the chairman of the Industrial Court on 27 February 1988, had applied under s 33A(1) of the Industrial Relations Act 1967 ('IRA') for nine questions of law to be referred to the High Court.

On 4 May 1988, the Industrial Court granted leave, and agreed to refer to the High Court four of the nine questions which are as follows:

2 Whether or not the Industrial Court erred in law when it held that s 32 of the Industrial Relations Act 1967 (the Act) has no relation to the locus standi of the union when (on its own finding) at least as at the date of the hearing the applicant represented at least 35 of its members in court.

3 Whether or not the Industrial Court erred in law when it concluded that '... all the teachers who were union members therein had either resigned from the union or had left the school because their contracts were not renewed ...' without evidence being led by the respondent on whether or not there are in fact union members still in the employ of the respondent at any particular point in time or date.

4 Whether or not the Industrial Court erred in law and/or exceeded its jurisdiction in holding that (at para 7) '... all the teachers who were union members therein had ... *left* the school because their contracts were not renewed' when (at para 5) it had held that '... 35 (of the teachers) had their services *terminated* by way of non-renewal of their contracts ...' since the reference by the Minister of Labour in question under which the Industrial Court purported to make the said award was a trade dispute between the applicant and the respondent over failure to reach a collective agreement on terms and conditions of employment.

5 Whether or not in making the said award the Industrial Court misdirected itself in law in failing to take into account the undisputed fact and its own finding that at least the 35 teachers whose dismissals were the subject matter of another trade dispute pending adjudication before another division of the Industrial court were and are members of the applicant at all material times.

Before me there were some arguments as to the jurisdiction and powers of the High Court when hearing an appeal under s 33A of the Industrial Relations Act, ie whether the High Court is limited to determine only questions referred to it. For the purposes of this appeal it is sufficient to quote s 33A(1) and (5) of the Industrial Relations Act which states:

> 33A(1) Where the court has made an award under s 30(1) it may, in its discretion, on the application of any party to the proceedings in which the award was made, refer to the High Court a question of law –
>
> (a) which arose in the course of the proceedings;
> (b) the determination of which by the court has affected the award;
> (c) which, in the opinion of the court, is of sufficient importance to merit such reference; and
> (d) the determination of which by the court raises, in the opinion of the court, sufficient doubt to merit such reference.
>
> (5) The High Court shall hear and determine the question referred to it under this section as if the reference were an appeal to the High Court against the award of the court, and may, consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary.

It appears that on the application of any party to the proceedings in which the award is made, the Industrial Court is not bound to refer any question of law to the High Court under s 33A(1) of the Industrial Relations Act, unless the Industrial Court is satisfied that the question is one which fulfils all the conditions provided in that section. In exercising its power to refer or not to refer a question to the High Court, the Industrial Court will have to do so judiciously. But once a question is referred to the High Court, the reference will be treated as if it were an appeal to the High Court, and each question referred to the High Court will be treated as a ground of appeal. Under sub-s (5) of s 33A of the Industrial Relations Act, the High Court will hear and determine the reference as if it is hearing an appeal from a lower court.

The facts of the case under appeal are as follows. The dispute is between the Han Chiang High School, Penang (hereinafter referred to as 'the school') and the National Union of Teachers in Independent Schools, West Malaysia (hereinafter referred to as 'the union')

over their failure to conclude a collective agreement on wages and terms and conditions binding on them.

Han Chiang High School, Penang was first established in 1951. Its main objective is to cater for Chinese students who are unable to get admittance into the national type schools. It employed teachers on a fixed term basis, subject to renewal on terms as follows:

> In the event of this contract being renewed, the teacher must notify the managing committee of his/her acceptance within one week from the date the renewal of the contract is offered. Otherwise the offer is deemed to have been rejected.
>
> If anyone does not receive any offer of the contract being renewed by the date of expiry of the contract, it will mean that his/her service has been terminated. The school takes no responsibility to inform him/her of his/her cessation of his/her employment.

Some of the teachers' contracts have been renewed under these terms for more than 20 years.

During the year 1985-86, the school had in its employ 83 teachers. Some time in 1985, 53 of these teachers joined the union and, on 2 July 1985, the union submitted to the school a claim for recognition under s 9(2) of the Industrial Relations Act 1967. There was no response to the union's claim for recognition and, on 28 August 1985, the union reported the matter to the director general of Industrial Relations. By a notice dated 23 August 1986, the Minister of Labour accorded recognition to the union and directed the school to take notice of such recognition under s 9(5) of the Act. On 21 October 1986, the union submitted a proposal on wages and terms and conditions to the school with a view to entering into a collective agreement binding on them. But there was no response to the union's proposal. On 28 November 1986, the school decided not to renew the contracts of all the teachers who were members of the union. Each of these teachers received identical notices, as follows:

> Dear Sir/Madam,
>
> As instructed by the board of directors, we would like to inform you that your service agreement with the school will be expired on 31 December 1986.
>
> The board of directors would like to take this opportunity to thank you for your service to the school.

On 17 December 1986, the union applied to the High Court, Penang for an injunction restraining the school from terminating the services of the teachers who were served with the notice. On 2 January 1987, the High Court in Penang granted the injunction prayed for by the union. The school then filed an appeal against the decision of the High Court.

On 14 July 1987, the Supreme Court allowed the appeal of the school and set aside the injunction of 2 July 1987. In its written judgment dated 23 November 1987 [see [1988] 1 MLJ 302], the Supreme Court added that the Industrial Court was the proper forum to deal with complaints of wrongful dismissal since it was empowered by the Act to order the employer to reinstate the workman to his former position or a similar position if the Industrial Court should hold that the dismissal was without just cause or excuse.

The school and the union were then locked in two disputes; one was a dispute over a collective agreement on wages and terms and conditions of employment for the teachers employed in the school, and the other was a dispute over the alleged wrongful dismissal of 35 teachers. The dispute over the collective agreement was referred to the Industrial Court by the Minister of Labour on 12 January 1987 for adjudication and the dispute over alleged wrongful dismissal of 35 teachers was referred to the Industrial Court on 14 August 1987. In the instant case, the Industrial Court is concerned only with the dispute over the collective agreement. The dispute over alleged wrongful dismissal of 35 teachers is before another division of the court.

At the hearing in the Industrial Court on 27 July 1987 and 28 January 1988, the school raised a preliminary issue that the union had no locus standi to represent the teachers in the instant case, as it contended that none of the teachers in the school were members of the union because out of 53 teachers who were members of the union, 18 had resigned from the union on various dates and 35 had their services terminated by way of non-renewal of their contracts. The school then relied on the case of *Reading & Bates (M) Sdn Bhd, Miri* v *Sarawak Union of Lands & Offshore Drilling Workers*[1] to support its contention. The union, on the other hand, submitted otherwise, contending that the case of *Reading & Bates (M) Sdn Bhd*[1] could be distinguished, as there was no closures of the school here.

In *Reading & Bates (M) Sdn Bhd*,[1] the Industrial Court held that, since the company had closed down and all its employees had left its service, the union had no locus standi as it did not represent anyone in the company over the dispute between the company and the union on collective agreement.

The Industrial Court here made a finding that although the school had not closed down, and was still in operation at the date of hearing, there was not a teacher employed by the school who was a union member because those who were union members had either resigned from the union or because their contracts were not renewed by the school. The Industrial Court held that the union could not represent and act in a dispute on behalf of the school teachers who were not its members or no longer its members, and so the union had no locus standi before the court.

As stated earlier, the dispute concerning the alleged wrongful dismissal of the 35 teachers who were union

members was referred to another division of the Industrial Court by the Minister on 14 August 1987. That division had not determined and made an award in respect of that dispute on 27 February 1988, when the question of locus standi of the union was heard by the Industrial Court. In holding that the union had no locus standi because it no longer had any members, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated. This Industrial Court had no jurisdiction to determine that dispute, because that very dispute had not been referred to it by the Minister, but to another division of the Industrial Court to adjudicate. Further, the finding by the court that the union had no members was wholly unsupported by evidence. The court had therefore reached that finding by assuming erroneously that because no union member was present before it on 27 February 1988, the union had no member to represent.

It was argued before me that the Industrial Court had to make its award without delay under s 30(3) of the Industrial Relations Act which states:

> 30(3) The court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under s 20(3).

The dispute over the collective agreement was referred to the Industrial Court by the Minister on 12 January 1987 and the award on locus standi of the union was made on 27 February 1988. As it is, there had been already some delay. But under the circumstances, since the Industrial Court had knowledge that the dispute over the wrongful dismissal and the reinstatement of teachers was being inquired into by another division of the Industrial Court, the court should have stayed further proceedings on the question of locus standi of the union until further determination of the dispute over the reinstatement.

I allow the appeal with costs, quash the award and make the further order that another division of the Industrial Court shall hear this dispute.

Appeal allowed.

Solicitors: *Lobo & Associates*; *Shook Lin & Bok.*

Reported by *Ng Sheau Jiuan*

Malaysian Industrial Development Finance Bhd v Eureka Ferro-Alloy Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C4-23-3254-86
SITI NORMA YAAKOB J
4 JANUARY 1989

Companies and Corporations – Debenture secured by plaintiff bank – Assets sold by receivers appointed under debenture – Allegation that receivers breached duty to obtain best market price by excluding stocks in trade from sale and failing to levy rentals from successful tenderer who kept machinery purchased in defendant's factory – Whether there exist merits in allegation

The plaintiff had granted a loan to the first defendant which was secured by (a) two guarantees of the third defendant and (b) a principal and supplemental debenture giving the plaintiff a first fixed charge on the assets of the first defendant and empowering the plaintiff to appoint receivers and managers upon default by the first defendant. Two receivers and managers were appointed on 3 January 1983 and they sold the first defendant's assets but the proceeds of sale were insufficient to settle the amount due to the plaintiff. The plaintiff subsequently obtained a judgment in default of appearance against the third defendant in respect of the balance due on the loan. The third defendant applied to set aside the judgment in default of appearance and the plaintiff appealed against the senior assistant registrar's order to the High Court.

In disputing liability, the third defendant alleged that the receivers had breached their duty to obtain the best market price for the charged assets by (i) failing to account for stocks that were not sold and excluding various items from the sale by tender; (ii) failing to levy rentals on the successful tenderer who was allowed to keep the machinery they purchased in the first defendant's factory. As a result , the first defendant suffered loss of rentals. In reply to the first allegation, the plaintiff averred that under the principal debenture dated 4 May 1983, the assets that were charged were only those specifically listed in the Third Schedule which consisted of foundry equipment, and that as stocks in trade and other assets did not form part of the Third Schedule, the receivers were not authorized to sell them. As to the second allegation, the plaintiff stated that the premises do not belong to the first defendant and as such, the right to let out or the loss of rentals does not arise at all.

Held, dismissing the plaintiff's appeal:

(1) The plaintiff's first reply cannot be right as there was a supplemental debenture executed on 13 January 1984 wherein under s 2.02, the Third Schedule to the principal debenture was deleted and replaced by another Third Schedule attached to the supplemental debenture for which the items charged were no longer restricted to foundry equipment alone but extended to all other chattels which the first defendant may thereafter acquire. The word 'chattel' is wide enough to include all stocks-in-trade and the fact that the receivers had not taken the stocks-in-trade into consideration when selling the other machinery would therefore lend support to the third defendant's allegation that the receivers had failed to take into consideration the interests of the third defendant when effecting the sale.

(2) The plaintiff's reply to the third defendant's claim of loss of rentals cannot be right also as the plaintiff had been informed as early as 2 October 1985 that the first defendant had entered into a sale and purchase agreement for the factory